84-1800

Office-Supreme Court, U.S.
FILED
MAY 28 1985
ALEXANDER L. STEVAS,
CLERK

No. _____

I N T H E S U P R E M E C O U R T

OF THE UNITED STATES

OCTOBER TERM, 1985

LORAS L. STEINES

Petitioner,

v.

THE ROCK ISLAND ARSENAL
DEPARTMENT OF ARMY &
CONSTITUENTS.

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

LORAS L. STEINES
Box 592, Moline, Illinois,
61265
Telephone: (309) 762-5677
Counsel for self

Counsel of Record

==========

121 pp

QUESTIONS PRESENTED FOR REVIEW

After the respondents (defendant-appellees) placed the petitioner in a handicapped class by separating him from employment for reasons of disability, then denied him the protection of the rights afforded him under the Executive Order 11478 of the President, and finally, failed to follow the orders of the Equal Employment Opportunity Commission that is given the right to issue such orders by this same executive order, can the lower courts justly apply the doctrine of res judicata to dismiss his complaint, and bar the due process of law of a case of discrimination and unfair practice to the petitioner.

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U. S. - Macey v. Chapman, C.A. Va., 22 F. 2d 474 13

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in this matter is unreported, and was rendered without oral argument. In its opinion and ensuing judgement, this Court of Appeals affirmed the judgement of the United States District Court for the Central District of Illinois, Rock Island Division, (see Appendix A), which had dismissed Loras L. Steines' complaint as being barred by the doctrine of res judicata and ordered that the Defendant's Motion for Summary Judgement be granted and the complaint be dismissed. (See Appendix B)

The opinion of the Seventh Circuit is attached as Appendix A. The order of the United States District Court for the Central District of Illinois is Attached as Appendix B. The order of the Seventh Circuit Court denying rehearing is

attached as Appendix C. The order of the United States District Court for Central District of Illinois denying Plaintiff's (Loras L. Steines') request for appointment of counsel is attached as Appendix D. The Equal Employment Opportunity Commission's Decision and notice of right to file in the United States District Court is attached as Appendix E. The unpublished order of the United States Court of Appeals for the Seventh Circuit affirming the District Courts decision is attached as Appendix F. The United States District Court for the Central District of Illinois dismissing the complaint and affirming the decision of the Appeals Officer is attached as Appendix G. The decision of the merit systems Protection Board Chicago Region denying the appellant restoration to his previous position and affirming the agency's action is attached

as Appendix H. The United States Civil Service Commission Federal Employee Appeals Authority's decision to remove appellant from his position and stating "attempts to locate a suitable reassignment for you (Loras) will continue", is attached as Appendix I.

JURISDICTION

The opinion of the Seventh Circuit Court of Appeals was dated and filed on January 18, 1985. A timely petition for rehearing was filed by petitioner Loras L. Steines. The Court of Appeals denied rehearing on February 26, 1985. (See Appendix C) This petition is timely filed within 90 days of that date pursuant 28 USC 2101 (C), as contemplated by Supreme Court Rule 20.4.

STATUTE INVOLVED

The Statues involved in this case is 29 C.F.R. s 1613.282 which provides in pertinent part:

> "the appellant is here by notified that this decision is final and that he has a right to file a civil action on the Rehabilitation Act claim in the appropriate U. S. District Court with-in thirty (30) days of the date of receipt of this decision.

Another statue involved in this case is the Constitution of the United States, Article XIV, Section 1. which provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Anotner statue involved in this case is the Equal Employment Opportunity Presidential Executive Order 11478, 34 F.R. 12985, 8-12-69; Amended by Executive Order 12106, 44 F.R. 1053, Title 3, (10,991) (See Appendix J) which provides in pertinent part:

> "It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicapped, or age and to promote the fullest, the full realization of equal employment opportunity through a continuing affirmative program in each

executive department and agency. This policy of equal opportunity applies to and must be an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

STATEMENT OF THE CASE

1. Statement of the Facts

Fifty six (56) days after the appellees (respondents) received written notice from their own civil service doctors stating that the appellant was not totally disabled and that two doctors do not indicate he had any disability, the petitioner was separated from his position as a machinist and that type of Federal Service from the Rock Island Arsenal, (R.I.A.), Illinois on December 5, 1977 for reasons of disability. Petitioner appealed the Arsenal's separation from his specific job (and with the idea of being eventually assigned to another job) by the Civil Service Commission Federal Employee Appeals Authority (FEAA). (See Appendix H) Since the petitioner was advised by his union that this was just a mix up and

not a termination of all employment and that eventually he would at worst have a different job, he had his appeal without a hearing with this agency and no challenge to the issue of full termination from all Federal Service. (See Appendix G) The petitioner, although, contacted the E.E.O. officer numerous times to request a formal complaint and a hearing, of which he was refused and any help or assistance. (See Appendix E)

The FEAA, stating that attempts were being made to find him (petitioner) a suitable reassignment, found that the agency had complied with the procedural requirements of the Civil Service regulations in removing petitioner from his specific position on an adverse action and affirmed the Agency decision on April 25, 1978. (See Appendix I) The

petitioner sought judicial review of this decision in the United States District Court for the then Southern (now Central) District of Illinois. On January 25, 1980, the District Court stated that the power of the court on review was limited to determine whether the proper procedures were followed, because the petitioner elected that the appeal be decided without a hearing. This court dismissed the complaint and affirmed the decision of the Appeals Officer. (See Appendix G) This decision was appealed by the petitioner to the United States Court of Appeals for the Seventh Circuit which affirmed the District's Courts decision on November 18, 1980. (See Appendix F)

After sending for all records under the Freedoms of Information act and finding a letter dated October 24, 1979,

stating that his application for employment (sf171) will be returned to him and he will no longer be considered for employment; the petitioner finally had the E.E.O. process his discrimination complaint. This led to the E.E.O.C. Appeal No. 01811017 and their decision to reverse the agency's finding of untimeliness and remanded the case to the agency "for further processing". The E.E.O.C. remand, citing 29 C.F.R. 1613.282, informed petitioner of his right to file a Civil Action on the handicapped claim. (See Appendix E)

Petitioner, on December 20, 1982, filed suit in the United States District Court for the Central District of Illinois.

During this suit, petitioner's request for Appointment of counsel was denied twice by the District Court.

(Appendix D) On February 16, 1984, Judge Mihm granted the defendant's Motion for Summary Judgement holding that the appellant's (petitioner) action was barred by the doctrine of res judicata, and dismissed appellants (petitioner) complaint. (Appendix B) On March 30, 1984, appellant filed an appeal to the United States Court of Appeals for the Seventh Circuit. On January 18, 1985, this court affirmed the District Courts decision. (Appendix A) On February 26, 1985, this court denied a petition for rehearing filed by the plaintiff appellant (petitioner). (Appendix C)

REASONS FOR ALLOWANCE OF WRIT

Rule 17.1 permits granting a review on the writ of certiorari when a Federal Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanction such a departure by a lower court, as for the petitioner to call for an excise of this Court's power of supervision.

In U.S. Air King Products Co. v. Hazeltine Research, D.D. N.Y., F.R.D.381., it states that each case must be considered according to its own setting and issues as to the doctrine of res judicata. The lower courts identified Lee v. City of Peoria 685 F. 2d 196, 199 (7th Cir. 1982) and Allen v. McCurry, 449 U.S. 90,94 (1980) of which have no similarities to the issues of Equal Employment and res judicata in this case.

In U.S.F.W. Woolworth Co. v. Contempory Arts, C.A. Mass. 193 F. 2d 162 and in Sims v. Greene, C.C.A. Pa., 160 F.2d 512 and in U.S.-Macey v. Chapman, C.A. Va., 22 F.2d 474., it states a lower court cannot take any unnecessary initiatory action which would be likely to impede investigations or abstruet impartial administration of justice.

ARGUMENT

The Equal Employment opportunity Presidential Executive Order 11478, Amended by Executive Order 12106, (See Appendix J) "prohibits discrimination in employment because of race, color, religion, sex, national origin, handicap, or age..." Since the respondent (appellees) labeled him handicapped the petitioner was given the protection of the E.E.O. laws under this order.

Also, in section 4, of this order it states:

> "The Equal Employment Opportunity Commission, after consultation with all affected departments and agencies shall issue such rules, regulations, orders, and instructions and request such information from the affected departments and agencies as it deems necessary and appropriates to carry out this order."

Therefore the petitioner, on August 9, 1982, in the Appeal No. 01811017, Loras L. Steines, Appellant v. Department of Army Appellee, was given the right to file a Civil Action on the Rehabilitation Act claim in the appropriate U.S. District Court within thirty (30) days of the date of receipt of this decision, by the E.E.O.C. who was given this right by the afore mention executive order.

The Constitution of the United States, Article XIV, section 14 (See Appendix K) clearly states

> "that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

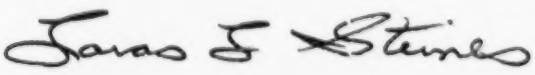
The petitioner contends that the lower courts in their actions to bar this case from the courts by the doctrine of res judicata would obstruct the impartial administration of justice, would deny him his Constitutional rights and would deny him his rights and protection of the laws under the Executive Order of the Presidents, of which were granted to him by the respondent's (appellee's) action of labeling him handicapped.

It would also relieve the responsibilities and duties of Federal agencies in fair practice of Equal Employment Opportunity to the handicapped.

CONCLUSION

For reasons stated in this writ, the petitioner calls for an excise of this Courts power of supervision that his rights are not denied and states that the petition should be granted.

Respectfully submitted,



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(petitioner)

APPENDIX A

UNPUBLISHED PER CURIAM ORDER

JUDGMENT -- WITHOUT ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

January 18, 1985

Before

Hon. Walter J. Cummings; Chief Judge

Hon. Richard D. Cudahy, Circuit Judge

Hon. Joel M. Flaum, Circuit Judge

LORAS L. STEINES, Plaintiff-Appellant No. 84-1523 vs. THE ROCK ISLAND ARSENAL DEPARTMENT OF ARMY & CONSTITUENTS, Defendant-Appellee.	)	No. 82 C 4095 Judge Michael M. Mihm

This cause came before the Court for decision on the record from the United States Court for the Central District of Illinois, Rock Island Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the Order of this Court entered this date.

APPENDIX B

US District Court
Central District of Illinois
FILED AND ENTERED

February 16, 1984
/s/ MICHAEL M. MIHM

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

LORAS L. STEINES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.
	)	82-4095
ROCK ISLAND ARSENAL, DEPARTMENT OF ARMY AND CONSTITUENTS,	)	
	)	
Defendant.	)	

ORDER

Plaintiff, Loras L. Steines, filed this action under the Rehabilitations Act of 1973 as amended and/or of the Vietnam Era Veterans Readjustment Assistment Act of 1974. (Plaintiff's complaint, paragraph 1).

BACKGROUND

Plaintiff was formerly employed at the Rock Island Arsenal as a Machinist, WB-3414-11 (Grade 11). His employment at the Arsenal commenced in 1969 and continued until December, 1977 when he was separated from his employment pursuant to the determination by the Rock Island Arsenal that he was permanently disabled.

Mr. Steines was first injured in July of 1975 when he fell off a three foot high platform. He was able to return to work three days later but was placed on a 15 pound weight restriction. In October of 1975 Plaintiff again fell at work and hurt his back. The Plaintiff was off work for two days and then returned to work with a thirty pound

weight restriction. (Plaintiff's complaint, paragraphs 4-8).

In November of 1976, the Plaintiff, still suffering some soreness in his back, agreed with the Defendant and his union to initiate a determination by the Civil Service Commission of a permanent disability. The Civil Service Commission sent the Plaintiff to Dr. Raymond Dasso in May of 1977. Dr. Dasso determined that the Plaintiff's disability was not of a permanent nature and that he could return to work with a 30 pound weight restriction while he was receiving treatment from Dr. Dasso. (Plaintiff's complaint, paragraph 15; Defendants' Exhibit A, Retirement file p. 27).

By August of 1977, Dr. Dasso had recommended that the thirty pound weight restriction be lifted. (Plaintiff's complaint, paragraph 16; Defendants' Exhibit A, Adverse Action file p. 34). However, the doctors at the Arsenal disagreed and felt that the weight restriction was still necessary for Plaintiff's well-being. (Defendants' Exhibit A, Adverse Action file p. 31; Retirement file p.36).

On November 1, 1977, Mr. Steines was notified that the Arsenal proposed to separate him from his Machinist position and from federal service. The reasons for the proposed separation were stated and Mr. Steines was given 15 days to respond. He filed no response.

The Plaintiff was sep rated from his employment on December 5, 1977 because of his alleged disability which rendered him unable to perform the full scope of his duties as a Machinist. (Plaintiff's complaint, paragraph 19).

Mr. Steines then appealed his separation to the Civil Service Commission's Federal Employee Appeals Authority (FEAA). Plaintiff waived his right to a hearing before the FEAA but did submit additional information to be considered. The decision of the Acting Chief Appeals Officer concluded:

> "Having found that the agency complied with the procedural requirements of the Civil Service regulations in taking the removal action, that the agency's reason for that action is supported by substantial evidence of record, and that appellant's removal was not arbitrary, capricious

> or unreasonable, we conclude that the removal was for such cause as will promote the efficiency of the service."

In September, 1978, Plaintiff sought review of this decision in federal court alleging that his separation was in violation of the law and that the proper procedures for investigation, hearing and review of his claim were not followed. The decision of the FEAA was affirmed by the district court and the Seventh Circuit Court of Appeals.

While these proceedings were pending, the Defendants proposed to re-employ Mr. Steines at the Arsenal, however, the proposal was rejected by Plaintiff's attorney. Later, Mr. Steines was offered a position which was the same classification, pay grade, and step as he held prior to his separation. While

Plaintiff did want to accept this position, he conditioned his employment on his being given an immediate indefinite leave of absence without pay pending the outcome of the federal proceedings. Plaintiff informed the arsenal that he or his attorney would contact them regarding the offer. (Affidavit of Robert B. Applegate, Personnel Staffing Specialist at the Arsenal).

Almost two months later, on October 24, 1978, Mr. Steines was presented with the same offer, even though he had failed to appear for work or further respond to the first offer. Plaintiff made no response to this offer.

In February, 1981, Plaintiff filed a formal complaint with the Arsenal's Equal Employment Opportunity Office alleging

that he had been illegally discriminated against because of his alleged handicap. It is not clear what the eventual outcome of thcse proceedings were.

The Plaintiff in his present complaint has alleged:

> "As a result of the Defendant's and Constituents willful failure and refusal to keep in employment the Plaintiff because of their perception of a disability of the Plaintiff, and their refusal to assist him in the Plaintiff's right of due process and affirmative action of which is in violation of the provisions of the Rehabilitation Act of 1973 as amended and/or of the Vietnam Era Veterans Readjustment Assistment Act of 1974, the Plaintiff is entitled to be employed in the position for which he was separated from, with back pay and retribution for damages to personal life and the lack of Affirmative action and willful harassment by the Defendant and Constituents." (Plaintiff's complaint, paragraph 24).

On October 12, 1983, the Defendants filed a motion to dismiss arguing that the doctrine of res judicata barred the Plantiff's present action. Because the Defendants' motion was accompanied by affidavits and exhibits outside the pleadings, the Court notified the parties that it intended to treat the Defendants' motion to dismiss as a motion for summary judgment pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. The parties were given an opportunity to present any additional material in support of their respective positions.

The Plaintiff's response to the Defendants' motion challenges some of the facts presented in the Defendants' motion and has a brief opposition to the legal arguments raised. As provided in Rule 56(e) of the Federal Rules of Civil Procedure:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The Plaintiff has not filed any affidavits which contradict the facts set forth in the Defendants' brief. Plaintiff has instead simply relied upon the allegations in his brief that some of the facts as related by the Defendants are incorrect. The Plaintiff has failed to set forth specific facts showing that there is a genuine issue for trial and, therefore, summary judgment, if appropriate, may be entered (Rule 56(e), Federal Rules of Civil Procedure).

DISCUSSION

The doctrine of res judicata prevents a party from relitigating issues which he has already had a full and fair opportunity to litigate in an earlier proceeding. Not only is the party barred from relitigating "the issues which were in fact raised and decided but also all other issues which could have been raised in the prior action". Lee v. City of Peoria, 685 F.2d 196, 199 (7th Cir. 1982). The doctrine of res judicata serves to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication". Allen v. McCurry, 449 U.S. 90, 94 (1980).

The elements necessary to invoke the doctrine of res judicata are:

1. A final judgment on the merits in an earlier action;

2. An identity of the cause of action in both the earlier and the later suit; and

3. The identity of parties or their privies in the two suits.

Lee, 685 F.2d at 199.

The Defendants argue that the District Court's dismissal of Mr. Steines' complaint which he filed in 1978 bars the present action which is based on the same set of facts. Mr. Steines' 1978 complaint alleged that his December, 1977 separation was "contrary to and in violation of the law and the regulations of the United States Civil Service, and is therefore invalid, null and void, and of no effect. . ." The Plaintiff sought to have the separation declared a violation of the laws of the United

States and an injunction issued requiring the Defendants to reinstate Plaintiff in his previous employment position.

It is clear that a final decision on the merits was made with respect to the 1978 claim, therefore, the first element is satisfied. In that proceeding the Court granted summary judgment in favor of the Defendants, concluding that there was "a rational basis for the administrative decision and that the same is not arbitrary and capricious". It is clear that a decision based on a motion for summary judgment can be given res judicata effect provided the decision otherwise meets the required elements. Hubicki v. ACF Industries, Inc., 484 F.2d 519 (3rd Cir. 1973); City Bank, N.A. v. Graphic Scanning Corp., 459 F. Supp. 337 (S.D.N.Y. 1978).

The second element--an identity of the cause of action in both the earlier and the later suits--presents some difficulty and is the item to which the Plaintiff primarily objects. The test to determine whether there is one cause of action has been stated:

> "A cause of action consists of a single core of operative facts which gives the plaintiff a right to seek redress for the wrong concerned. Even though one group of facts may give rise to different claims for relief upon different theories of recovery, there remains a single cause of action. If the same facts are essential to the maintenance of both proceedings or the same evidence is needed to sustain both, then there is an identity between the allegedly different causes of action asserted, and res judicata bars the later action." Lee, 685 F.2d at 200, quoting Morris v. Union Oil Company of California, 96 Ill.App.3d 148, 421 N.E. 2d 278, 51 Ill.Dec. 770 (1981).

See also, Gasbarra v. Park Ohio Industries, 655 F.2d 119, 121 (7th Cir. 1981).

There is no doubt that the two actions which the Plaintiff has commenced are based on the same set of facts. While it is true that the 1978 action involved a review of the Federal Employee Appeals Authority decision affirming the Plaintiff's separation from his position at the Rock Island Arsenal, it is this separation which forms the basis of the Plaintiff's present complaint. In both cases the Plaintiff was seeking to be reinstated to the position from which he had been separated. The present action is simply another means by which the Plaintiff has challenged his discharge from the Rock Island Arsenal. As such, it is the same cause of action as was litigated in the 1978 proceedings.

The Plaintiff has had a full and fair opportunity to present the circumstances surrounding his discharge from the Arsenal to the Civil Service Commission. That decision was affirmed in the 1978 district court action and on appeal by the Seventh Circuit. To allow the Plaintiff another opportunity to raise these issues would be contrary to the policies behind the doctrine of res judicata.

The final element required to invoke the doctrine of res judicata is that there be an identity of parties or their privies in the two suits. Obviously the Plaintiff is the same in each case. While the named Defendants are not the same in each case, it certainly is true that the Defendants listed in each case are in privity with each other. The present case names the Rock Island

APPENDIX C

FILED
February 26, 1985
MICHAEL M. HIHM, Judge

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

LORAS L. STEINES,	)	
	)	
Plaintiff-Appellant	)	
	)	No. 84-1523
v.	)	
	)	No. 82
THE ROCK ISLAND ARSENAL	)	C 4095
DEPARTMENT OF ARMY & CONSTITUENTS,	)	ORDER
	)	
Defendant-Appellee.	)	

Appeal from the United States
District Court for the
Central District of Illinois,
Rock Island Division

BEFORE: CUMMINGS, Chief Judge, and
CUDAHY and FLAUM, Circuit Judges

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff Loras L. Steines, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX D

FILED
November 9, 1983
ROBERT J. KAUFFMAN
Clerk, US DISTRICT COURT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

LORAS L. STEINES,	)	
	)	
Plaintiff	)	
	)	No. 82-4095
v.	)	
	)	
THE ROCK ISLAND ARSENAL DEPARTMENT OF THE ARMY et al,	)	
	)	
	)	
Defendants.	)	

ORDER

The Plaintiff, Loras L. Steines, has filed a Motion to Appeal this Court's Order of October 21, 1983, denying Plaintiff's request for appointment of counsel. The Court will consider Plaintiff's motion as a motion to reconsider its earlier ruling.

Again, after reviewing the Plaintiff's motion, it is the Court's decision to deny his request for appointment of counsel and, therefore,

IT IS ORDERED that the Plaintiff's Motion to Reconsider (Motion to Appeal) is DENIED.

ENTERED: November 9th, 1983.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

APPENDIX E

FILED
August 9, 1982
Treva McCall
Executive Officer

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

WASHINGTON, D.C. 20506

LORAS L. STEINES,	)
	)
Appellant	)
	)
v.	) Appeal No.
	) 01811017
	)
DEPARTMENT OF THE ARMY,	)
	)
	)
Appellee	)

Decision

On March 25, 1981, the agency issued the attached decision in this proceeding. Thereafter, appellant filed the present appeal.

The appeal was submitted to the Equal Employment Opportunity Commission (EEOC) and accepted in accordance with the provisions of EEOC Order No. 960, as amended. The appeal is brought under Section 501 of the Rehabilitation Act of 1973, as amended.

Background

On November 1, 1977, appellant was noticed in writing of a proposed separation from service due to "inability to perform the full scope of machinist duties." Immediately prior to issuance and receipt of this notice, appellant had been made aware of the pending action and contacted an EEO counselor in October 1977. Following issuance of the notice, appellant again contacted the agency EEO

office in November, 1977. On December 5, 1977, the agency issued a final notice of separation. The appellant indicates in his letter of appeal that on December 20, 1977, he received no satisfaction in contacting the EEO office of the agency nor did he receive any instructions with regard to filing a complaint. Following a lengthy period in which other aspects of the matter were addressed by the United States Civil Service Commission, a U.S. District Court and the United States Court of Appeals, appellant again contacted an EEO Counselor in December 1980 which ultimately led to the filing of a discrimination complaint on March 10, 1981. The agency rejected the complaint as being untimely for failure to file a complaint within 30 days of

December 5, 1977, the alleged date of discrimination.

Analysis and Findings

The issue is whether the complaint should be rejected as untimely filed. Initially, it should be noted that appellants are not required to file a complaint within thirty days of the date of the alleged discrimination. Rather, 29 C.F.R. 1613.214 requires that an appellant "bring to the attention of an EEO counselor the matter causing him to believe he had been discriminated against within 30 calendar days of the date of that matter." This appellant did. This appellant attempted on frequent occasions to contact an EEO counselor immediately prior to and subsequent to the alleged

discriminatory event, namely separation based on disability.

In the absence of an agency rebuttal to appellant's scenario of contacts and attempted contacts with an EEO officer, we deem appellant's recitation of events to be accurate. Therefore, appellant timely contacted an EEO counselor and was under no procedural obligation to file a complaint within 30 days of the alleged date of discrimination.

Conclusion

Based on a review of the record, the decision of the Equal Employment Opportunity Commission is to reverse the agency's final decision rendered on March 25, 1981, and to remand the case for further processing in accord with the

appropriate EEO regulations. It should be noted that this decision in no way constitutes a ruling on the merits of the case.

IMPLEMENTATION OF THE COMMISSION DECISION

Under EEOC regulations, compliance with the Commission's corrective action is mandatory. The agency must report to the Commission, within thirty (30) calendar days of receipt of the decision, that corrective action has been taken. The agency's report should be forwarded to the Compliance Officer, Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506. A copy of the report should be sent to the appellant.

NOTICE OF RIGHT TO FILE A CIVIL ACTION

Pursuant to 29 C.F.R. 1613.282, the Appellant is hereby notified that this decision is final and that he has the right to file a civil action on the Rehabilitation Act claim in the appropriate U.S. District Court within thirty (30) days of the date of receipt of this decision.

APPOINTMENT OF COUNSEL

If the appellant does not have an attorney, or is unable to obtain the services of one, upon his request, the District Court may, in its discretion, appoint counsel to represent him.

NOTICE OF RIGHT TO REQUEST REOPENING

The appellant and the agency are hereby notified that the Commissioners

may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued;

2. The previous decision involves an erroneous interpretation of law or regulations or misapplication of established policy; or

3. The previous decision is of precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

This notice is in accord with 29 C.F.R. Section 1613.235. As provided therein, agency requests to reopen must be filed within 30 days from the date of receipt of decision.

FOR THE COMMISSION:

s/s Treva McCall

Executive Officer

Executive Secretariat

APPENDIX F

UNPUBLISHED PER CIRCUIT RULE 35

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

November 18, 1980

Before

Hon. William J. Bauer, Circuit Judge

Hon. John Minor Wisdom,
Senior Circuit Judge*

Hon. Richard D. Cudahy, Circuit Judge

LORAS L. STEINES, Plaintiff-Appellant No. 80-1316 vs. HAROLD BROWN, Secretary of Defense, Defendants-Appellees.	No. 78 4034 Judge Robert D. Morgan

*The Honorable John Minor Wisdom, Senior Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

O R D E R

Plaintiff-appellant Loras L. Steines was discharged from his job as a machinist at the Rock Island Arsenal. Steines appeals the order of the district court upholding his discharge by the Federal Employee Appeals Authority. We affirm.

Judicial review of an administrative discharge "'is limited to insuring that required procedures have been substantially complied with and that the action taken was not arbitrary or capricious.'" Young v. Hampton, 568 F.2d 1253, 1257 (7th Cir. 1977), quoting Pauley v. United States, 419 F.2d 1061, 1065 (7th Cir. 1969); Ringquist v. Hampton, 582 F.2d 1138, 1139 (7th Cir. 1978), cert. denied, 440 U.S. 910 (1979).

Appellant was discharged because a back injury resulted in a medical restriction limiting his ability to lift weights to thirty pounds. His job required him to lift weights to forty-five pounds. The Arsenal concluded that he was unable to perform the full duties of his position. There was a sufficient connection between his discharge and "the efficiency of the service," 5 U.S.C. 7501(a), providing a rational basis for his discharge. Young v. Hampton, 568 F.2d 1260. The action of the agency was thus not arbitrary and capricious. Id. at 1257; Ringquist v. Hampton, 582 F.2d at 1140; Doe v. Hampton, 566 F.2d 265, 272 (D.C. Cir. 1977).

Appellant's discharge was not arbitrary even though he was denied disability retirement by the United

States Civil Service Commission. The courts have recognized that an employee "can be too disabled to continue work, but not disabled enough to qualify for disability retirement." Piccone v. United States, 407 F.2d 866, 872 (Ct. Cl. 1969); Polos v. United States, 621 F.2d 385, 393 (Ct. Cl. 1980). Although a seemingly incongruous result, it is possible because the current regulations governing the civil service retirement system and discharge for disability provide different standards. Fancher v. United States, 588 F.2d 803, 808 (Ct. Cl. 1978); compare Federal Personnel Manual, ch. 831-1, sub ch. 5 10 with id., ch. 339 1-3 (6); and 5 U.S.C. 8331 (6), 8337. As the district court noted,

> [d]isability retirement is geared to total disability to perform service. Medical disability separation from a particular position is geared to inability

> for medical reasons to perform the particular duties of that position, without any implications that the affected employee is not capable of functioning in some other comparable classification of federal employment.

Appendix of Appellant at 14.

There was also substantial compliance with the procedures governing appellant's discharge. Appellant was given timely notice of his proposed separation from service, an adequate explanation of the reasons for it, and adequate opportunity to present his position. 5 C.F.R. 752.202 (a).

The judgment of the district court is

AFFIRMED

APPENDIX G

US District Court
Central District of Illinois
FILED AND ENTERED

January 25, 1980
/s/ ROBERT D. MORGAN

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

LORAS L. STEINES,	)	
Plaintiff,	)	No. 78 4034
v.	)	
HAROLD BROWN, et al.,	)	
Defendants.	)	

DECISION AND ORDER

Plaintiff filed this complaint to review a decision rendered April 25, 1978, by the Federal Employee Appeals Authority, an agency of the United States Civil Service Commission which affirmed

the action of the Rock Island Arsenal, Department of the Army, discharging the plaintiff from his position as an Arsenal employee, effective December 5, 1977. Three motions are before the court for decision.

Plaintiff's motion to amend his prayer for relief must be allowed. In his original complaint, plaintiff prayed a judgment holding that his dismissal by the Arsenal is null and void and directing that he be thereafter reinstated in the position from which he had been removed. He now moves to amend the prayer for relief to demand that he be reinstated with back pay.

Defendants' position is that allowance of the amendment would deprive the court of jurisdiction for the reason that the jurisdiction of a district court

to award back pay in employment cases is limited to awards of $10,000 or less. 28 U.S.C. 1346 (a)(2). They argue that jurisdiction would reside only in the Court of Claims if the complaint be amended. 28 U.S.C. 1491.

The defendants' argument is fallacious. The court certainly has jurisdiction to resolve the controversy now before it, and, upon a judgment for the plaintiff, to order his reinstatement with back pay. E.g., Sherar v. Harless, 561 F.2d 791 (9th Cir. 1977); McCourt v. Hampton, 514 F.2d 1365 (4th Cir. 1975); White v. Bloomberg, 501 F.2d 1379 (4th Cir. 1974). In the event of a judgment for plaintiff, a future jurisdictional question may arise should the court be called upon to fix the amount of any back pay award. That potential bridge to

cross, in futuro, cannot affect the plaintiff present right to demand determination that he is entitled to back pay.

Both plaintiff and defendants have filed motions for summary judgment. Inasmuch as the review power of the court is limited to consideration of the record before the administrative agency, the entry of summary is virtually a mandated result, in the absence of the appearance of some factor, patent upon that record, which would indicate a necessity to remand the cause to the appropriate administrative agency for some further proceeding.

At all material times, plaintiff was a preference-eligible, career employee, employed as a machinist at the Arsenal. The requirements for his employment were,

inter alia, that he be on his feet, and mobile, for extended periods of time, and that he be able to lift materials of up to 45 pounds gross weight as a part of his assigned duties. At a time in 1975, which is not reflected by the record, plaintiff suffered a back injury. As a result of that injury, the Arsenal surgeon imposed a medical restriction that plaintiff could not lift any object weighing more than thirty pounds. The record reflects that he did on several occasions have interviews with persons in the personnel section of the Arsenal, which appear to have been geared to exploration of other categories of employment with the Arsenal, as to which the physical restriction would not impose any impediment. Memoranda of those interiews tend to reflect that plaintiff

had stated that he would not consider any employment at a lower classification than that of machinist, or any employment which did not also include a third shift pay increment. One of such memoranda were initiated by the employing agency. The opinion affords no clue as to the final outcome of that litigation.

The record made upon plaintiff's voluntary application for disability retirement is not a part of the record before this court, because the same was never presented to the Appeals Officer upon this appeal.

The thrust of plaintiff's argument goes substantially to his denigration of the record which was made before the Appeals Authority. That thrust is appropriately characterized as the

assertion of evidence which might have been.

It is recognized that the record made is not without question. It is recognized that there may exist relevant evidence which might have been submitted to the Appeals Authority. It is recognized that there may be some significance in the fact that plaintiff was retained on the payroll in his classification during an interim period from his injury to the date of his involuntary separation from employment. Yet, none of those factors can bridge the gap left open by plaintiff by his failure to request a hearing. Defendants responded to plaintiff's appeal, in part, by stating that plaintiff had been retained on the payroll in his classification until his ultimate

discharge. That statement does not compel the inference that plaintiff was, in fact, during such period of time, fully performing his required duties. At best, it suggests the recognition by the Arsenal that there existed an area for further inquiry, especially in view of the personnel conferences which were geared to his reassignment, and in view of the fact that the retirement proceeding was pending during some substantial part of that time.

The argument is addressed to the wrong forum. Plaintiff cannot recites that plaintiff was advised that he had four available alternatives, in view of the fact that the lifting restriction prevented him from fully discharging his duties. Those were disability retirement, involuntary reassignment,

discharge for disability, or his resignation.

Plaintiff applied for disability retirement. On August 2, 1977, his application was rejected by the United States Civil Service Commission. At some time in August 1977, plaintiff submitted to the Arsenal a statement from a Dr. Dasso stating that plaintiff could "go to work on August 22, 1977," with no restrictions. Thereafter, plaintiff was interviewed by a doctor for the Arsenal, who concluded that the thirty-pound lifting restriction should remain in force.

On November 1, 1977, plaintiff was notified by a letter that the Arsenal proposed to separate him from employment because of his inability to perform the full scope of his required duties. He

was also notified by that letter that he could respond thereto within fifteen days. He made no response to the letter. Thereafter, plaintiff was advised by a second letter that he would be separated from his employment effective December 5, 1977, and of his right to appeal that determination. By his signature affixed to a copy of that letter, plaintiff acknowledged that he had received the same on November 22, 1977.

Plaintiff did institute an appeal to the Appeals Authority. He elected that the appeal be decided without a hearing, upon information provided to the Authority by the respective parties. The action taken by the Arsenal was affirmed. This complaint followed.

The power of the court on review is limited to determination whether the

proper procedures were followed by the federal agency and whether the discharge of the federal employee was arbitrary and capricious. Ringquist v. Hampton, 582 F.2d 1138, 1139 (7th Cir. 1978), cert. denied, _____U.S._____(1978); Pauley v. United States, 419 F.2d 1061, 1065 (7th Cir. 1969). The parameters of the second of those permissible areas of review are further restricted by the precedential authority that an agency action is not arbitrary and capricious if the record made before the agency shows a rational basis for the action taken. Ringquist v. Hampton, supra, at 1139-1140; Young v. Hampton, 568 F.2d 1253, 1257 (7th Cir. 1977); Wroblaski v. Hampton, 528 F.2d 852, 853 (7th Cir. 1976); Wood v. United States Post Office Department, 472 F.2d

96, 99 (7th Cir. 1973), cert. denied, 412 U.S. 939 (1973).

Plaintiff does not directly challenge the propriety of the procedures followed by the employing agency. He attempts by indirection to raise the implication that there was a procedural deficiency.

The Appeals Officer prepared a written memorandum of decision which included a section denominated as "Background." In that background section, he recited that plaintiff was notified by letter of November 1 that the Arsenal proposed to terminate his employment. Continuing, that memorandum recited that, "By letter personally delivered to the appellant on November 11, 1977," plaintiff was advised that his

employment would be terminated effective December 5, 1977.

As above noted, the November 1 letter advised plaintiff that he might make an oral or written response within fifteen days. Plaintiff now argues that the reference to a letter on November 11 is a finding of fact by the Appeals Officer which conclusively shows that plaintiff received his termination notice prior to expiration of the time allotted to him to respond to the November 1 letter.

That argument is facetious in view of the record presented to the Authority by the parties. The only document which apprised the Authority as to the grounds asserted by plaintiff as a basis for appeal was plaintiff's letter of December 20, 1977. That letter was limited to the

contention that the action taken by the Arsenal was inconsistent with the prior Civil Service decision that he was not eligible for disability retirement. It contained no challenge to the procedures followed by the Arsenal in effecting his discharge. It aserted no challenge to the timeliness of the determination that he would be discharged. Thus, there was no challenge to the regularity of the procedures followed by the Arsenal in terminating his employment, but only his assertion that that determination was inconsistent with the Civil Service decision denying to plaintiff disability retirement.

In that context it is not seen in what manner the Appeals Officer's reference to the "November 11" date can be characterized as a "finding of fact"

by that officer. His reference to the mentioned date was a prefatory summary of factual background for the conclusions and decision which that officer deemed the factual context to require.

That prefatory comment is wholly inconsistent with the record before the Appeals Officer. The one indicia as to the date of that letter, since the same bears no date, is plaintiff's signed acknowledgment that the letter was received by him on "11-22-77." Plaintiff does not challenge the authenticity of that acknowledgment, nor the accuracy of the date of "11-22-77," which would appear to have been written by his hand. The most that can be said for this position by plaintiff is that the Appeals Officer recited a date which the record before him refuted. Whatever

characterization be given to that recital, it could not possibly have had any bearing upon the one issue which plaintiff had recited as a basis for appeal, namely, the presumed inconsistency between the separate actions taken by the Civl Service and Arsenal.

The one remaining issue is the question whether the decision appealed is arbitrary and capricious, i.e., whether there is a rational basis in the record for the action taken. E.g., Ringquist v. Hampton, supra, at 1139. That issue must be resolved against the plaintiff and for the defendants.

The written notice to plaintiff of the proposal of termination clearly stated that the action was being taken because plaintiff was unable to perform

his assigned duties because of the medical restriction, and that the workload in his department required that he be replaced by someone who could fully perform the full range of required duties. It was further stated that, because of that disability, the best interests of the Arsenal required the separation of plaintiff from continued service. By reference to the November 1 letter, the termination notice delivered to plaintiff on November 22, 1977, recited the same reason for his termination.

Medical information before the Authority is limited to the following. The first is a written determination by Dr. Paul Bergfelder, Arsenal Post Surgeon, on or about July 28, 1976, that plaintiff could not lift more than thirty

pounds because of his back condition. The restriction is noted to be "permanent." The second is an undated written statement by a Dr. Raymond W. Dasso, which states, "Loras Steines may go to work on August 22, 1977. Regular work with no restrictions." The third is composed of two memoranda of interviews of Dr. Ralph Ashby, an Arsenal physician, with plaintiff on August 17, 1977, and August 23, 1977, in which Dr. Ashby concluded that the permanent lifting restrictions should be continued because of continuing low back pain.

Plaintiff argues that the Ashby memoranda have no relevant merit because Dr. Ashby never examined the plaintiff physically. He also argues that the purported Dasso removal of the lifting restriction refutes the stated reason for

termination of plaintiff's employment. The essence of plaintiff's argument related to the relative weight of the meager medical evidence in the file before this court is a request for the court to do what it lacks the authority to do, namely, to weigh the evidence. This was a function of the Authority. Whether or not this court would have reached the same decision had it sat in the Appeals Officer's chair, can have no bearing if the record reflects a rational basis for the decision which the Appeals Officer did make. However, one comment upon the medical evidence is warranted. Dr. Ashby recorded that he had asked plaintiff whether he could handle his job, and that plaintiff had responded to the effect that he was not certain that

he could do so, but he thought that he deserved a chance to try.

A fact which has a critical bearing upon the question of there being a rational basis for the decision by the Authority is the fact that plaintiff did not, either by any written or oral representation to the Arsenal, or by any written submission to the Authority, challenge the stated ground for termination of his services. As above noted, he made no response to the Arsenal and he limited the statement of his position upon his appeal to his view that if he was not entitled to permanent disability retirement as determined by the Civil Service, he could not be discharged for the reason that he was physically disabled to function in his assigned position at the Arsenal. He

relied upon what he deemed to be a patent inconsistency between the two decisions.

The decision of the Civil Service denying disability retirement is not patently inconsistent with this decision affirming plaintiff's termination from his employment. The first, i.e., plaintiff's application for disability retirement, required proof that he had become "totally disabled for useful and efficient service" in his position or any other position "of the same grade or class." Fed. Pers. Manual, ch. 831-1, sub. S 10(b). By comparison, a federal agency may separate an employee when he "no longer can perform the duties of his *** position efficiently and safely because of a physical or mental condition, ***." Ibid, ch. 339, 1-3(b).

A distinction is inherent in the summary of those provisions. Disability retirement is geared to total disability to perform service. Medical disability separation from a particular position is geared to inability for medical reasons to perform the particular duties of that position, without any implications that the affected employee is not capable of functioning in some other comparable classification of federal employment. The defendants define that distinction in their brief as the distinction between total and partial disability. That definition may well be oversimplistic as a generic statement, but it sufficiently pinpoints the decision which this court is now called upon to render. There is a rational basis in the record for the determination that plaintiff cannot fully

perform the duties which his machinist classification at the Arsenal requires. There is nothing of record which has any tendency to indicate whether or not plaintiff could perform the duties required by other comparable federal employment positions within the same wage classification.

In this context, plaintiff relies upon the decision in Kleinfelter v. United States, 318 F.2d 929 (Ct. Cl. 1963), a decision which he asserts to be indistinguishable from this case. That reliance is misplaced.

Kleinfelter was not a decision upon the merits of the cause pleaded, but only a denial of a motion for summary judgment. The specific claim was for compensation, grounded upon the theory that there had been an illegal

interruption of the plaintiff's federal employment. Any parallel between the factual background of that case and this is illusory.

Kleinfelter, a preference-eligible employee, was emmployed as a fireman by the Department of the Army. Following a routine annual physical, the post surgeon concluded that Kleinfelter was physically unfit for continued employment because of an indicated cardiac condition, plus obesity and an age of 61 years. The employing agency then gave him notice of termination of employment on a termination date which was geared to the full utilization of his accumulated sick leave and annual leave, a period of some six months. He filed his written objections to the agency's proposal of

his termination. He appealed the determination that he be discharged.

Prior to a determination of Kleinfelter's appeal, the agency withdrew its separation proceeding, replacing it with a request for involuntary retirement of Kleinfelter because of total physical disability. The latter application was disallowed, whereupon the employing agency notified Kleifelter to return to work. His complaint sought back pay for the downtime and reinstatement of accumulated annual and sick leave which was largely exhausted during the separation proceedings.

The only issue resolved by the decision was the denial of the government's motion for summary judgment. In that context the court said that it must be assumed that the Civil Service

decision would have been the same, upon either the original appeal from a separation order or upon the amended basis of involuntary disability retirement. In that statement the court presumed that the record in each context would have been the same: No comment can be directed to that assumption, except recognition that both the original proceeding and the amended proceeding now complain of alleged deficiencies in the record made. If those deficiencies do exist, they are there because plaintiff elected to waive an administrative hearing and thereby limit the evidentiary record.

The court is satisfied that there is a rational basis for the administrative decision and that the same is not arbitrary and capricous.

IT IS ORDERED, therefore, that plaintiff's motion to amend his complaint is ALLOWED.

IT IS FURTHER ORDERED that judgment enter dismissing the complaint and affirming the decision of the Appeals Officer.

s/s Robert D. Morgan

Robert D. Morgan

United States District Judge

APPENDIX H

MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGION
FEDERAL OFFICE BUILDING
230 SOUTH DEARBORN STREET
31ST FLOOR
CHICAGO, ILLINOIS 60604

APPEAL OF LORAS L. STEINES

UNDER PART 353 OF THE CIVIL SERVICE REGULATIONS

DECISION NUMBER: CH035309004

DECIDED ON: March 22, 1979

I. INTRODUCTION

By letter dated July 21, 1978, Mr. John Malvik, Attorney, appealed in behalf of Mr. Loras L. Steines from a decision dated July 13, 1978 denying the appellant's request for restoration after recovery from disability to his former position of Machinist, WG-11 step 4, at the U. S. Army Arsenal at Rock Island, Illinois.

The appeal was timely filed and falls within the appellate jurisdiction of the Merit Systems Protection Board.

II. BACKGROUND

The appellant sustained an on-the-job back injury on June 24, 1975. The injury recurred on May 13, 1977 after the appellant had resumed regular full-time employment with his agency. The U. S. Department of Labor accepted the claim on August 26, 1977 and by letter dated January 13, 1978 awarded the appellant compensation beginning May 31, 1977. Compensation terminated on June 26, 1977 because the appellant had declined opportunities for light duty work which had been made available to him by his agency.

On December 5, 1977 the appellant was removed from his position by adverse action under 5 CFR Part 752-B, for inability to perform the full scope of his duties as a Machinist. He appealed that decision to this office (then the Chicago Field Office of the Federal Employee Appeals Authority), on December 20, 1977. Adjudication of that appeal was completed on April 25, 1978 and the removal was affirmed by decision number CH752B80263.

By letter dated June 21, 1978 the appellant petitioned his agency for restoration under the provisions of 5 CFR 353.101-306 and 5 USC Chapter 81. By letter dated July 13, 1978 Mr. Patrick J. Broderick, Acting Chief, Civilian Personnel Office, Rock Island Arsenal denied the appellant restoration on

grounds that the appellant was not receiving compensation at the time of his separation and did not thereafter receive such compensation. Accordingly, the statutory and regulatory provisions as cited were found by the agency not to apply to the appellant's case and no entitlement to restoration was found thereunder.

The appeal from that decision was received in this office on July 24, 1978. The agency file was received October 13, 1978 and a copy thereof was forwarded to the appellant's attorney for review and comment on October 16, 1978. Comment and additional materials were received in response thereto from the appellant's attorney on October 26, October 27, and November 24, 1978. Final representations

were received on January 24, 1979, and the record was closed for adjudication.

III. ANALYSIS AND FINDINGS

In order to establish entitlement to restoration after recovery from disability under the provisions of 5 CFR Part 353 an employee must:

1. Have a compensable injury (5 CFR 353.102(d),

2. Have been separated or furloughed from a position without time limitation as a result of a compensable injury (5 CFR 353.103(c)(1), and

3. Must fully recover from the injury or disability within one year after the date of commencement of compensation or from the time compensable disability recurs if the recurrence begins after the injured employee has resumed regular full-time employment with the United States (353.302(b)).

The record reflects that the agency and the appellant have joined issue with respect to the first requirement. In his letter of September 22, 1978 the Civilian Personnel Office, Rock Island Arsenal advised this office that:

> "In the letter from Mr. Steines dated 21 June, 1978 (Enclosure 1), he requested restoration to duty pursuant to 5 USC 8151 and 5 CFR 353.101 etc. In the letter, dated 13 July 1978 (Enclosure 2), denying his requested restoration Mr. Steines was informed that the cited references applied to individuals who are fully recovered from compensable injuries.
>
> Mr. Steines was not receiving compensation at the time of his separation, and has not received compensation since his separation for any work related injury. Therefore, the reference cited by Mr. Steines was not relevant to his situation and the agency could not restore him under these provisions."

The appellant's attorney on the other hand argues in his submission of October 24, 1978:

"The Arsenal in paragraph two of its response, relies on the fact that Mr. Steines was not receiving compensation at the time of his separation from any work related injury. The fallacy of that reasoning is simply that the Arsenal has misinterpretated the regulations and statutes. The Arsenal Staff apparently is laboring under the faulty assumption that these regulations require that a person be receiving compensation at the time he was discharged. That is simply not the law. What is required that the separation was a result of a compensable injury. Mr. Steines' injury was incurred on the job while he was working, and therefore fits the definition of injury given in 5 CFR 353.102. At the time of his separation, Mr. Steines had returned to work under a weight lifting restriction, and therefore would have not been receiving compensation. The fact that Mr. Steines was either rightfully or wrongfully not receiving compensation at the time of his separation, or after his separation, has nothing to do with whether the injury was compensable when incurred, and whether he is now recovered. The fact remains, Mr. Steines was separated from his employment on December 5, 1977 as a result of

> an injury that he received on the job, i.e., a compensable injury within the meaning of 5 CFR 353.102."

The issue, then as joined between the appellant and the agency is whether an employee can be found to have a compensable injury absent an award of compensation by the Department of Labor. We find, however, that it is not necessary to resolve that issue in the adjudication of the instant appeal because the record is clear that, contrary to the agency's express representation to the contrary, the appellant had in fact received an award of compensation from the Department of Labor for his injury, and further that the agency was well aware of that fact at the time of his application for restoration. As we indicated in our discussion in the background portion of

this decision, correspondence occurred between the agency and the Department of Labor relative to the appellant's injury and his claim for compensation therefor on no fewer than three occasions between June and December of 1977. The agency's Civilian Personnel Office was directly notified of acceptance of the appellant's claim in a letter dated August 26, 1977 to the Civilian Personnel Office from the Department of Labor and, they were further notified by copy of a letter to the appellant of an award of compensation under that claim in a letter dated January 13, 1978. Thus, the agency's statements suggesting there was not a job-related injury, and that the appellant was not receiving compensation at the time of his separation, or thereafter, is simply not true. We find,

from review of the evidence, that the appellant had a compensable injury at the time of his separation.

The second requirement, that the appellant be separated for the compensable injury is also moot. The record reflects that the appellant was removed by adverse action for inability to perform the lifting requirements of his position. That restriction was placed upon the appellant because of his back injury which had been found compensable by the Department of Labor pursuant to its authority under 5 USC 8124. Thus, although the agency characterized the cause of action for removal as inability to perform the duties of his position, the record is clear that the inability directly resulted from his compensable back

injury. We find contrary to the finding of the agency, that the appellant was removed as a result of a compensable injury and that he is therefore covered by the provisions of 5 CFR Part 353.

On examination of the record in light of the third requirement, we find, however, that the appellant fails to meet the time limit thereunder. Specifically, the claim of recovery from disability does not fall within the one year period contemplated by the regulation. As previously indicated, the date of recurrence was May 13, 1977 whereas the claim for recovery was June 21, 1978 more than one month after the anniversary of the recurrence. Accordingly, we find that the appellant is not entitled to restoration under the provisions of 5 CFR 353.301 as he has claimed.

The appellant has also argued that even absent an absolute right of restoration under 5 CFR 353.301, that he is nevertheless entitled to priority placement under the provisions of 5 USC 8151(b)(2) which provides:

> "The department or agency which was the last employer shall, if the injury or disability is overcome within a period of more than one year after the date of commencement of compensation, make all reasonable efforts to place in accord priority to placing, the employee in his former or equivalent position within such department or agency, or within any other department or agency."

Our examination of the circumstances attendant to the instant case in light of the statutory language above quoted indicates that the appellant's claim to priority placement appears to be well founded. However, our jurisdiction under 5 CFR 353.401 extends only to issues

involving the right of restoration. Having determined that the appellant has not established a right of restoration we may not give consideration to his claim for priority consideration because that issue falls outside the scope of our appellate review.

IV. CONCLUSION

We have found that the appellant sustained a compensable injury for which he was separated from his position, and that the appellant is, therefore covered by the provisions of 5 CFR Part 353. However, we have further found that the appellant has not met the requirements of part 5 CFR 353.302 and that he is not therefore entitled to restoration thereunder. Accordingly, we must conclude that the agency's action, in

denying the appellant's request for restoration, was proper.

V. DECISION

In view of the foregoing, the agency's action denying the appellant restoration to his previous position is affirmed.

The decision of the appeals officer is final and there is no further right of appeal. This means that the decision of the appeals officer marks the exhaustion of those administrative remedies which must precede resort to the courts. However, sections 772.310 and 772.312 of Title 5 Code of Federal Regulations, permits the Board, in its discretion, and notwithstanding the exhaustion of the right of appeal or the pendency of suit, to reopen and reconsider any previous decision of an appeals officer when the

party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence that was not readily available when the decision of the appeals officer was issued;

(2) The previous decision of the appeals officer involves an erroneous interpretation of law or regulation, or a misapplication of established policy; or

(3) The decision of the appeals officer is of a precedential nature involving new or unreviewed policy considerations that may have effect beyond the case at hand; or

(4) The decision of the appeals officer involves policy implications extending beyond the case at hand of such significance as to merit the personal attention of the Board members.

If the agency has evidence or argument which it believes meets one or more of these criteria, it must submit

that information and where appropriate, evidence of temporary or conditional compliance with this decision, not later than 30 days after receipt of the decision.

If the appellant has evidence or argument which he believes meets one or more of these criteria, he must submit that information within a reasonable time after receipt of this decision.

Such request should be sent to:

Director
Office of Appeals Review
Merit Systems Protection Board
Washington, D. C. 20419

For the Board:

s/s Hoyt C. Griffin, Jr.
Hoyt C. Griffin, Jr.
Acting Chief Appeals Officer

APPENDIX I

UNITED STATES CIVIL SERVICE COMMISSION
FEDERAL EMPLOYEE APPEALS AUTHORITY
CHICAGO FIELD OFFICE
CHICAGO, ILLINOIS 60604

APPEAL OF MR. LORAS L. STEINES

UNDER PART 752, SUBPART B, OF THE CIVIL SERVICE REGULATIONS

DECISION NUMBER: CH752B80263

DECIDED ON: April 25, 1978

I. INTRODUCTION

By letter of December 20, 1977, Mr. Loras L. Steines, appealed from an action removing him from his position as a Machinist, WG-11, step 4, $8.31 per hour, Rock Island Arsenal, Department of the Army, Rock Island, Illinois on December 5, 1977.

The appeal was timely filed and falls within the appellate jurisdiction of the Federal Employee Appeals Authority.

II. BACKGROUND

By letter dated November 1, 1977, Mr. A.C. Lehman, Chief, N/C Gen Mach Br I, notified the appellant of a proposal to remove him from the Federal Service.

The appeal file did not contain a written or oral response from the appellant to the proposed removal.

By letter personally delivered to the appellant on November 11, 1977, Mr. George Bartz, Chief Factory Division, advised the appellant of his decision to remove him from the Federal Service effective December 5, 1977.

The appellant's initial appeal letter was received on December 27, 1977. Additional correspondence was received from the appellant on February 28, 1978 and March 15, 1978. The agency file was received on February 8, 1978 and was transmitted to the appellant for review

and comment by letter dated February 10, 1978. By letter received on February 28, 1978, the appellant requested that his appeal be adjudicated without a hearing. The record was closed for adjudication on March 15, 1978.

III. ANALYSIS AND FINDINGS

The letter of November 1, 1977 advised the appellant of the following reason for his proposed removal:

> The reason for this proposed action is: Inability to perform the full scope of machinist duties.
>
> The specific circumstances relating to the above reason are as follows:
>
> a. Your official duties as a Machinist, WG-3434-11, Job #DA-122A, include manufacturing parts and complete items of equipment from raw stock of different kinds of metals and metal alloys and other materials, and performing machining work required in the manufacture

of castings, forgings, weldments, and other fabrications. You work in a well-lighted, headed, ventilated shop with concrete floors. You are exposed to dust from grinding, oil from machines, dirt, heat, noises, and fumes. You are subject to strains from infrequent moving, lifting and handling of heavy items.

b. On 28 July 1976, Dr. Paul Bergfelder, M.D., Rock Island Arsenal Post Surgeon, performed a fitness for duty examination on you. The following restriction on your employment was maintained: No lifting over 30 pounds.

c. Acceptable performance of your position requires that you be able to perform heavy lifting and carrying (over 45 pounds), straight pulling, walking or standing for up to eight (8) hours a day, and repeated bending.

With the medical restriction cited in paragraph b above, you are unable to do so. Additionally, attempts have been made to find another position which you are ready, willing and able to perform.

Included in these attempts was a detail to the Quality Assurance Directorate as an Inspector in January 1977. Instead of reporting to work on the detail you took unauthorized leave. You were initially very restrictive in the type of job you would consider stating you would only accept WG-11 on a rotating shift. Actions such as this have made your placement much more difficult. However, attempts to locate a suitable reassignment for you will continue.

Your application for disability retirement was denied on 2 August 1977, and since we are to this date unable to reassign you, proposal of your separation is necessary to open your position for filling with an employee who is able to perform the full range of duties required. The workload in the Factory Division, Arsenal Operations Directorate,

is such that the full scope of the Machinist's duties must be performed. Since you are unable to perform the full duties, as evidenced by the lifting restriction, it is considered to be in the best interest of the Factory Division, Rock Island Arsenal, that your separation be proposed.

We find that the reasons supporting the proposed action were stated with sufficient specificity and detail to permit the opportunity for reply and refutation. The appellant was allowed sufficient time to submit answers, personally and in writing, and submit affidavits in support thereof. The appellant was further informed where to review the material relied on to support the reasons for the proposed action. Accordingly, we find that the appellant

was given a reasonable opportunity to respond to the proposed adverse action.

The written notice of decision was issued by a higher level official than the person who proposed the action. The appellant was advised that the reason advanced for the proposed action was fully supported and sufficient to warrant the action. The appellant was advised of his further appeal rights.

Our review as set out above reveals that the agency complied with the procedural requirements of controlling regulations. Accordingly, the merits of the case must be considered.

The basis of the removal action taken against the appellant is that his duties require that he be able to lift over forty-five pounds and that the agency medical authorities restricted the appellant from lifting more than thirty

pounds. The appeal file contains a medical statement from Dr. Ralph Ashby, Rock Island Arsenal Clinic that the appellant is restricted from lifting more than thirty pounds. (Tab G, Tab L) The agency also provided the position description of the appellant and a SF-78 identifying the functional requirements and environmental factors associated with the appellant's position. (Tab M, Tab N) We find that these documents clearly show that a machinist is required to perform strenuous physical duties and lift up to forty-five pounds.

The appellant acknowledges the information provided by the agency, but contends that his doctor stated "Loras Steines may go to work on August 22, 1977. Regular work with no restrictions." (Tab H) No additional supportive information was provided. On

the other hand, the statement of Dr. Ashby dated August 19, 1977 is three pages of detailed analysis concerning the appellant's condition and therefore is much more persuasive than the brief memorandum of Dr. Russo. Accordingly, the reason as set out in the notice is supported by the evidence of record and is sustained.

The appellant argues that because his application for disability retirement based on his back condition was denied that the agency is now precluded from removing him because his back condition prevents him from lifting more than thirty pounds. We are not aware of any such provision in case or regulation. In this regard, we note that the two matters differ in that the instant appeal is from an agency action taken under the provisions of Part 752B of the Civil

Service regulations. The agency, in appeal has the burden of proving the basis for the removal by a preponderance of the substantial evidence of record. In this case, we have found that the agency has a proper basis upon which it determined that removal was warranted, and further, his provided evidence in support thereof. The appellant's disability decision is a Civil Service Commission determination on whether the employee, by medical evidence has stated that he is totally disabled for useful and efficient service and that decision is separately by appealable to this office. In view of the foregoing, we find that the determination of the appellant's application for disability retirement is not relevant to a determination of the merits of the proposed removal.

The appellant contends that the agency failed to provide him with a position of a less strenuous nature. On a consideration of this point, we find no requirement that the agency not proceed with an adverse action based on an inability to perform all the duties of the position until such time as the appellant is transferred into a different position. The facts in the instant case disclose the appellant is unable to perform all the duties of his position. His condition is of such a nature that the agency could reasonably determine that his removal was warranted. Having determined that the agency is not precluded by law or regulation from removing the appellant and further that his inability to perform all his duties is of such gravity as to offer a reasonable basis for his removal, it

follows that the agency's action was not arbitrary, capricious or unreasonable.

CONCLUSION

Having found that the agency complied with the procedural requirements of the Civil Service regulations in taking the removal action, that the agency's reason for that action is supported by substantial evidence of record, and that appellant's removal was not arbitrary, capricious or unreasonable, we conclude that the removal was for such cause as will promote the efficiency of the service.

DECISION

The agency action in removing appellant from his position is hereby affirmed.

The decision of the appeals officer is final and there is no further right of appeal. This means that the decision of

the appeals officer marks the exhaustion of those administrative remedies which must precede resort to the courts. However, section 772.310 of the Civil Service regulations permits the Commission's Appeals Review Board, in its discretion, and notwithstanding the exhaustion of the right of appeal or the pendency of suit, to reopen and reconsider any previous decision of an appeals officer when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the decision of the appeals officer was issued;

(2) The previous decision of the appeals officer involves an erroneous interpretation of law or regulation, or a misapplication of established policy; or

(3) The decision of the appeals officer is of a precedential nature involving new or unreviewed policy considerations that may have effect beyond the case at hand.

If the agency has evidence or argument which it believes meets one or more of these criteria, it must submit that information and, where appropriate, evidence of temporary or conditional compliance with this decision, not later than 30 days after receipt of the decision.

If the appellant has evidence or argument he believes meets one or more of these criteria, he must submit that information within a reasonable time after receipt of this decision.

Such request should be sent to:

Chairman
Appeals Review Board
U. S. Civil Service Commission
Washington, D. C. 20415

For the Commission:

s/s Walter Orr
Walter Orr
Acting Chief Appeals Officer

APPENDIX J

EQUAL EMPLOYMENT OPPORTUNITY PRESIDENTIAL EXECUTIVE ORDERS

Executive Order 11478,
34 F.R. 12985, 8-12-69;
Amended by Executive Order 12106,
44 F.R. 1053,
1-3-79, eff. 1-1-79

Title 3--THE PRESIDENT
EXECUTIVE ORDER 11478

[10,991] EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT

Section 1. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all persons, to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency. This policy of equal opportunity applies to and must be

an integral part of every aspect of personnel policy and practice in the employment, development, advancement, and treatment of civilian employees of the Federal Government.

Sec. 2. The head of each executive department and agency shall establish and maintain an affirmative program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in section 1. It is the responsibility of each department and agency head, to the maximum extent possible, to provide sufficient resources to administer such a program in a positive and effective manner; assure that recruitment activities reach all sources of job candidates; utilize to the fullest extent the present skills of each employee;

provide the maximum feasible opportunity to employees to enhance their skills so they may perform at their highest potential and advance in accordance with their abilities; provide training and advice to managers and supervisors to assure their understanding and implementation of the policy expressed in this Order; assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability; and provide for a system within the department or agency for periodically evaluating the effectiveness with which the policy of this Order is being carried out.

Sec. 3. The Equal Employment Opportunity Commission shall be responsible for directing and furthering the implementation of the policy of the Government of the United States to provide equal opportunity in Federal employment for all employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) and to prohibit discrimination in employment because of race, color, religion, sex, national origin, handicap, or age.

Sec. 4. The Equal Employment Opportunity Commission, after consultation with all affected departments and agencies, shall issue such rules, regulations, orders, and instructions and request such information from the affected departments and

agencies as it deems necessary and appropriate to carry out this Order.

Sec. 5. All departments and agencies shall cooperate with and assist the Equal Employment Opportunity Commission in the performance of its functions under this Order and shall furnish the Commission such reports and information as it may request. The head of each department or agency shall comply with rules, regulations, orders and instructions issued by the Equal Employment Opportunity Commission pursuant to Section 4 of this Order.

APPENDIX K

CONSTITUTION OF THE UNITED STATES

ARTICLE XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.